



Law Society
of Scotland

Consultation response

Automated Vehicles: Consultation paper 3 - A
regulatory framework for automated vehicles

March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee, and Obligations Law, Privacy Law and Equalities Law Sub-committee welcome the opportunity to respond to the third part of the Law Commission's consultation on Automated Vehicles regarding *A regulatory framework for automated vehicles*.¹ We have the following comments to put forward for consideration.

Response to questions

Consultation Question 4 (Paragraph 5.119)

18.4 We welcome observations on which of the following standards is most appropriate when assessing the safety of automated vehicles:

- (a) as safe as a competent and careful human driver;
- (b) as safe as a human driver who does not cause a fault accident;
- (c) overall, safer than the average human driver.

In our view this should be (a) or (c). The safety standards need to be commensurate with the current position that all persons using the road would expect – effectively that they are safe and can expect those driving on the road to be experienced and skilful drivers.²

Consultation Question 6 (Paragraph 5.121)

18.6 We welcome practical suggestions for how AV regulators can fulfil their public sector equality duty.

In order for the AV regulators to comply with their public sector duties, it is essential that they conduct equality impact assessments. These should be carried out regularly, thoroughly and must focus on the impact on all

¹ [Scottish Law Commission :: Automated vehicles \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/automated-vehicles)

² *Nettleship v Weston* 1971 2QB 691 held that applying a lower standard to the learner driver because the instructor was aware of her inexperience would result in complicated shifting standards. It would imply, for example, that an inexperienced doctor owed his patient a lower standard of care if the patient was aware of his lack of experience. The standard of care for a learner driver would be the usual standard applied to drivers: that of an experienced and skilled driver.

protected characteristics. Automated vehicles will potentially provide benefits to people by providing accessible and responsive travel options, however they can also present barriers and risks to both those using the road and to those within the ASD. It is essential that these are identified, and fully assessed to avoid unintended negative consequences.

CHAPTER 8: INITIAL APPROVALS AND CATEGORISATION – PROPOSALS

Consultation Question 9 (Paragraph 8.17)

18.9 We provisionally propose that:

- (1) unauthorised automated driving systems should be prohibited; and**
- (2) this should be subject to an exemption procedure by which the Secretary of State may authorise unauthorised systems to be used in tests and trials. Do you agree?**

Yes.

Consultation Question 10 (Paragraph 8.25)

18.10 We provisionally propose that:

- (1) the Government should establish a domestic scheme to approve automated driving systems (ADSs) for use on roads in Great Britain (a “national ADS approval scheme”);**
- (2) manufacturers should have a free choice to apply for approval under either the UNECE system of international type approvals or through the national scheme;**
- (3) developers should be able to submit an ADS for national approval, even if they are not responsible for manufacturing the whole vehicle. Do you agree?**

Yes, it seems sensible that a domestic scheme is set up applying across the Great Britain.

The concern that we have with regard to Paragraph (3) is that it must be clear who is responsible for the ADS in the sense of negligence or issues. If developers can submit an ADS for national approval then this system and responsibility must be clearly set out.

Consultation Question 11 (Paragraph 8.43)

18.11 We provisionally propose that:

- (1) an ADS approval scheme should be established through regulation under the Road Traffic Act 1988, without further legislative reform;**
- (2) an ADS should be defined as a combination of software, hardware and sensors, which can be installed in a “type” of vehicle;**
- (3) when an ADS is approved, the approval should be accompanied by specifications for:**
 - (a) the type of vehicle in which it can be installed; and**
 - (b) how the ADS is installed within the vehicle;**
- (4) where an ADS is installed in a pre-registered vehicle, an example vehicle should be submitted to the regulator for approval of the installation. Do you agree?**

We assume that the reference to regulations refers to secondary legislation. The concern we have is how the system is going to operate and that it is clear and has maximum transparency. It may be best for this to be set out by means of primary legislation. That ensures robust and full scrutiny. However, much depends on the technical details require rather than the enabling provisions. More detail as to what this entails is required.

Consultation Question 12 (Paragraph 8.44)

18.12 We invite observations on the appeal process in regulation 19 of the Road Vehicles (Approval) Regulations 2020, including:

- (1) how it works in practice; and**
- (2) how well it is suited to the proposed national ADS approval scheme.**

We have no comment to make. We would suspect that the section has not been in force that long in order that a robust assessment can be made as to how this is operating as far as appeals are concerned.

Consultation Question 13 (Paragraph 8.71)

18.13 We provisionally propose that:

- (1) once an ADS has received type approval at either international or domestic level, an Automated Driving System Entity (ADSE) would need to submit the vehicle to the UK safety regulator for categorisation as able to safely drive itself;**
- (2) the safety regulator should make a recommendation to the Secretary of State for how the vehicle should be classified;**
- (3) it should be open to the safety regulator to recommend that an ADS-enabled vehicle is classified in one of three ways: as not self-driving but driver assistance; as self-driving only with a user-in-charge; or as self-driving without a user-in-charge;**
- (4) the safety regulator should only recommend classification as self-driving (either with or without a user-in-charge) if it is satisfied that:**
 - (a) an ADSE is registered as taking responsibility for the system;**
 - (b) the ADSE was closely involved in assessing safety and creating the safety case; and**
 - (c) the ADSE has sufficient funds accessible to the regulator to respond to improvement notices, to pay fines and to organise a recall. Do you agree?**

This seems an appropriate system but more details are required to reach a firm conclusion.

Consultation Question 14 (Paragraph 8.77)

18.14 We provisionally propose that a new legislative framework should provide regulation making powers to specify:

- (a) who should assess whether a vehicle is capable of self-driving;**
- (b) the procedure for doing so; and**
- (c) criteria for doing so. Do you agree?**

The legislative framework will need to cover a broad range of issues. We will consider the draft legislation when available and provide comments at that time.

Consultation Question 15 (Paragraph 8.78)

18.15 We seek views on whether the new legislation should include provisions for appeals against a categorisation decision. If so, should these be similar to those in regulation 19 of the Road Vehicles (Approval) Regulations 2020?

This may prove an appropriate mechanism. However, it may depend on the use that has been made of this section to date.

CHAPTER 10: ASSURING SAFETY IN USE**Consultation Question 17 (Paragraph 10.82)**

18.17 We provisionally propose that legislation should establish a scheme to assure the safety of automated driving systems following deployment, giving scheme regulators

enhanced responsibilities and powers.
Do you agree?

Yes, this seems appropriate.

Consultation Question 20 (Paragraph 10.100)

18.20 Should the authority administering the scheme to assure safety while automated vehicles are in use be kept separate from type approval authorities (as is already the case)? Alternatively, should both functions be combined in a single body?

This needs more consideration surely to see the extent of overlap and also if there are any potential conflicts of interest.

Consultation Question 21 (Paragraph 10.101)

18.21 What formal mechanisms could be used to ensure that the regulator administering the scheme is open to external views (such as duties to consult or an advisory committee)?

We would welcome both mechanisms.

CHAPTER 11: INVESTIGATING TRAFFIC INFRACTIONS AND COLLISIONS

Consultation Question 22 (Paragraph 11.24)

18.22 We provisionally propose that a statutory scheme to assure AVs in-use should:
(1) investigate safety-related traffic infractions (such as exceeding the speed limit; running red lights; or careless or dangerous driving);
(2) investigate other traffic infractions, including those subject to penalty charge notices;
(3) if fault lies with the ADSE, apply a flexible range of regulatory sanctions.
Do you agree?

There seems to be merit in ensuring all safety related infractions are investigated involving AVs – not just those specified above. It is not clear how they would receive knowledge of these incidents.

We note that the consultation refers to regulatory sanctions. This seems to be lying with civil enforcement - is this what is intended?

Consultation Question 23 (Paragraph 11.53)

18.23 We provisionally propose that the regulator which assures the safety of AVs in-use should have powers to impose the following sanctions on ADSEs:
(1) informal and formal warnings;
(2) fines;
(3) redress orders;
(4) compliance orders;
(5) suspension of authorisation;
(6) withdrawal of authorisation; and
(7) recommendation of attendance at a restorative conference.
Do you agree?

We assume again the reference to fines means civil penalty rather than criminal standards.

Consultation Question 24 (Paragraph 11.54)

18.24 We provisionally propose that the legislation should provide the regulator with discretion over:

- (1) the amount of any monetary penalty; and**
- (2) the steps which should be taken to prevent re-occurrence of a breach. Do you agree?**

Care must be taken in imposing civil penalties that those penalties are proportionate and transparent and that there is an appropriate appeals mechanism.

Consultation Question 25 (Paragraph 11.69)

18.25 We provisionally propose that a specialist incident investigation unit should be established:

- (1) to analyse data on collisions involving automated vehicles;**
- (2) to investigate the most serious, complex or high-profile collisions; and**
- (3) to make recommendations to improve safety without allocating blame. Do you agree?**

Yes.

Consultation Question 26 (Paragraph 11.82)

18.26 We provisionally propose that the UK Government should establish a forum for collaboration on the application of road rules to self-driving vehicles.

Do you agree?

Yes. It may be appropriate for this to sit within the Department for Transport.

Consultation Question 29 (Paragraph 12.37)

18.29 We provisionally propose that following the end of the transition demand period:

- (1) the user-in-charge should re-acquire the legal obligations of a driver, whether or not they have taken control of the vehicle; and**
- (2) if, following a failure to respond to a transition demand, the vehicle stops in a manner which constitutes a criminal offence, the user-in-charge should be considered a driver and should therefore be liable for that offence. Do you agree?**

Yes. In terms of (1), the legal obligations re-acquired by the user in charge should extend to civil liability to compensate victims of any accidents caused by the AV.

Consultation Question 30 (Paragraph 12.45)

18.30 We seek views on whether a person with a provisional licence should be allowed to act as a user-in-charge, if accompanied by an approved driving instructor in a vehicle with dual controls.

If this is to replicate a normal driving experience, then this seems correct.

Consultation Question 31 (Paragraph 12.53)

18.31 We provisionally propose that legislation should create new offences of:

- (1) using an automated vehicle as an unfit or unqualified user-in-charge; and**
- (2) causing or permitting the use of an automated vehicle by an unfit or unqualified user-in-charge. Do you agree?**

Yes, these seem reasonable – but the penalties to be imposed need to be appropriate and transparent, as does the nature of the offence.

Consultation Question 32 (Paragraph 12.59)

18.32 We provisionally propose that persons carried without a user-in-charge should be guilty of a criminal offence. Do you agree?

Please see response to Question 18.31

Consultation Question 33 (Paragraph 12.60)

18.33 We seek views on whether the new proposed offence of being carried without a user-in-charge should only apply if the person:

- (1) knew that the vehicle did not have a user-in-charge; and**
- (2) knew or ought to have known that a user-in-charge was required.**

That depends on whether it is considered that there should be an imposition of strict liability.

Consultation Question 34 (Paragraph 12.66)

18.34 We provisionally propose that a user-in-charge who takes over control of the vehicle:

- (1) should be considered a driver; but**
- (2) should have a specific defence to a criminal offence if, given the actions of the ADS, a competent and careful driver could not have avoided the offence.**

Do you agree? If not, we welcome views on alternative legal tests.

We refer to our answer to Question 18 above. We consider the appropriate test can be found in *Nettleship v Weston*.³

Consultation Question 35 (Paragraph 12.94)

18.35 We provisionally propose that the user-in-charge should be liable for criminal offences which do not arise from the dynamic driving task, including those related to:

- (1) insurance;**
- (2) maintaining the vehicle in a roadworthy condition (including installing safety critical software updates);**
- (3) parking;**
- (4) duties following accidents to provide information and report accidents to the police; and**
- (5) ensuring child passengers wear seatbelts. Do you agree?**

Yes if these replicate current liability and responsibility.

Consultation Question 36 (Paragraph 12.95)

18.36 We provisionally propose that the legislation should include a regulation-making power to clarify those roadworthiness failings which are (and those which are not) the responsibility of the user-in-charge. Do you agree?

This seems reasonable and to provide the necessary flexibility.

³ see footnote 2 above

Consultation Question 38 (Paragraph 13.86) L

18.39 We provisionally propose that:

- (4) the regulation of self-driving vehicles should distinguish between an Automated Driving System Entity (which vouches for the design of the system) and an operator (responsible for the operation of individual vehicles);**
- (5) all vehicles authorised for use on roads or other public places with no user-incharge should either:**
 - (a) be operated by a licensed operator; or**
 - (b) be covered by a contract with a licensed operator for supervision and maintenance services;**
- (6) it should be a criminal offence to use a NUIC vehicle on a road or other public place unless it is operated by a licensed operator or is covered by a contract with a licensed operator for supervision and maintenance services.**

Do you agree?

This seems reasonable.

Consultation Question 40 (Paragraph 13.108)

18.41 We provisionally propose that, irrespective of the nature of the vehicle, a licensed operator should be under a duty to:

- (1) supervise the vehicle;**
- (2) maintain the vehicle;**
- (3) insure the vehicle;**
- (4) install safety-critical updates and maintain cybersecurity; and**
- (5) report accidents and untoward events (as defined by the regulator). Do you agree?**

Yes.

Consultation Question 41 (Paragraph 13.109)

18.42 We provisionally propose that legislation should include a regulation-making power by which some or all of these duties could be transferred to the registered keeper or owner, if it was shown that it was appropriate to do so. Do you agree?

Yes.

CHAPTER 14: CRIMINAL OFFENCES BY ADSES AND THEIR SENIOR MANAGERS

Consultation Question 44 (Paragraph 14.107)

18.46 We provisionally propose that:

- (1) it should be a criminal offence for an ADSE to omit safety-relevant information or include misleading information when putting a vehicle forward for classification as self-driving or responding to information requests from the regulator;**
- (2) the offence should apply to senior managers (where it was attributable to the manager's consent, connivance or neglect);**
- (3) the offence should not apply to more junior employees;**
- (4) the offence should carry a higher sentence if it is associated with a death or serious injury;**
- (5) the offence should be prosecuted in England and Wales by either the regulator or the Crown Prosecution Service and in Scotland by the Procurator Fiscal. Do you agree?**

Yes – and note the reference to Scotland where the prosecution will lie with the Crown Office and Procurator Fiscal Service – but to note that this will be subject to prosecution being in the public interest and also sufficient admissible evidence according to Scots law and the requirements of corroboration are satisfied.

Consultation Question 45 (Paragraph 14.108)

18.47 We seek views on the following proposed offences.

Offence A: non-disclosure and misleading information in the safety case

When putting forward a vehicle for classification as self-driving, it would be a criminal offence for the ADSE to

- (1) fail to provide information to the regulator; or**
- (2) provide information to the regulator that is false or misleading in a material particular where that information is relevant to the evaluation of the safety of the ADS or the vehicle. The ADSE would have a defence if it could show that it took reasonable precautions and exercised all due diligence to prevent the wrongdoing. The penalty would be an unlimited fine.**

We would observe that many offences are subject to fixed penalties. Would this not be one but this would not rule out prosecution in court if required.

Offence B: non-disclosure and misleading information in responding to requests

When a regulator requests specific information from an ADSE (whether before or after deployment), it would be a criminal offence for the ADSE to

- (1) fail to provide information to the regulator; or**
- (2) provide information to the regulator that is false or misleading in a material Particular where that information is relevant to the evaluation of the safety of the ADS or the vehicle. The ADSE would have a defence if it could show that it took reasonable precautions and exercised all due diligence to prevent the wrongdoing. The penalty would be an unlimited fine.**

Please see above.

Offence C: offences by senior management

Where offence A and/or offence B committed by a body corporate is proved—

- (3) to have been committed with the consent or connivance of an officer of the body corporate; or**
- (4) to be attributable to neglect on the part of an officer of the body corporate, then that officer is guilty of the offence. An officer includes any director, manager, secretary or other similar officer or any person who was purporting to act in any such capacity. We see this as equivalent to offences under the Human Medicines Regulations 2012 and General Product Safety Regulations 2005, which carry a penalty of a fine and/or a maximum two years' imprisonment.**

Care needs to be taken when looking at corporate responsibility. This would need assessed to ensure that attributing corporate responsibility and at what level is correct.

Offence D: aggravated offences in the event of death or serious injury following non-disclosure or provision of misleading information to the AV safety regulator

Where a corporation or person commits Offences A to C, that offence is aggravated where the misrepresentation or non-disclosure:

- (5) related to an increased risk of a type of adverse incident; and**
- (6) an adverse incident of that type occurred; and**
- (7) the adverse incident caused a death or serious injury.**

We see this as equivalent to the offence of causing death by dangerous driving, which carries a penalty of an unlimited fine and/or a maximum of 14 years' imprisonment.

Please see above.

Consultation Question 46 (Paragraph 14.109)

18.48 We welcome views on whether an ADSE should be under a duty to present information in a clear and accessible form, in which safety-critical information is indexed and signposted.

This seems a correct approach.

However, we note that this consultation, quite rightly, identifies the criminal and regulatory investigations as a need for the collection of data, and provides examples of road traffic incidents as to how this data would be of benefit in such circumstances. That said, it does not seem to exclude the potential for location data to be used for broader criminal and regulatory investigations eg the police using the data to track the movements of an ADS, to track what locations the ADS has been to and when – for purposes other than road traffic. There needs to be some further consideration as to the intended (or indeed possible) scope of use of the data in criminal and regulatory investigation.

Is it open to enforcement agencies to access and use such data for any criminal investigation or should there be any additional restrictions (or a higher or lower bar for justifying use) depending on the matter being investigated?

CHAPTER 15: NEW WRONGFUL INTERFERENCE OFFENCES

Consultation Question 47 (Paragraph 15.10)

18.49 We provisionally propose that legislative amendment should clarify that the tampering offence in section 25 of the Road Traffic Act 1988 applies to anything that is physically part of a vehicle and any software installed within it. Do you agree?

Yes – and it may give rise to common offences too.

Consultation Question 48 (Paragraph 15.11)

18.50 We welcome views on whether the tampering offence should apply to external infrastructure required for the operation of the AV.

Yes – and it may give rise to common offences too.

Consultation Question 49 (Paragraph 15.53)

18.51 We provisionally propose that there should be an aggravated offence of wrongfully interfering with an AV, the road, or traffic equipment contrary to section 22A of the Road Traffic Act 1988, where the interference results in an AV causing death or serious injury, in:

- (1) England and Wales; and**
- (2) Scotland. Do you agree?**

There may need to be consideration as to the standard to be applied. It may need to be wilful or reckless rather than wrongfully.

Consultation Question 50 (Paragraph 15.55)

18.52 We provisionally propose that the appropriate mental element for the aggravated offence is intent to interfere with a vehicle, the road or traffic equipment. Do you agree?

That refers to our response above. More details are required to assess if the level of criminality is appropriate

CHAPTER 16: CIVIL LIABILITY**Consultation Question 52 (Paragraph 16.24)**

18.54 We provisionally propose that the way the Automated and Electric Vehicles Act 2018 deals with contributory negligence and causation is:

- (1) adequate at this stage; and**
- (2) should be reviewed by the UK Government in the light of practical experience. Do you agree?**

We note our previous confirmation, in our Consultation Response dated 5 February 2019, that sections 3(1) and 6(3) of the Automated and Electric Vehicles Act 2018 are sufficiently clear. The regime under the Law Reform (Contributory Negligence) Act 1945 is well-understood and reference to it in the 2018 Act will assist in developing clear and workable law. We note that the approach in the 2018 Act has been acknowledged in relevant commentary and, in our view, these provisions remain adequate at this stage.

In terms of (2), we consider that it would be prudent for the UK Government to review the legislation in line with relevant practical experience. We do not foresee a need for the legislation to be reviewed after any specific period of time. This should be reviewed if it is felt that this would be beneficial in light of any difficulties in applying this regime, the outcomes for parties to claims, and any relevant policy developments.

Consultation Question 53 (Paragraph 16.32)

18.55 We provisionally propose that measures should be put in place to compensate the victims of accidents caused by uninsured AVs. Do you agree?

We agree that measures should be put in place to compensate the victims of accidents caused by uninsured AVs. A gap in protection in respect of victims of accidents caused by uninsured AVs is undesirable. Putting in place compensation measures would avoid unfairness and hardship to victims and would support a general policy consideration of ensuring that losses resulting from road traffic accidents are recoverable.

We echo the hopes expressed in the Consultation Paper that the UK Government and the Motor Insurers' Bureau will extend the compensation regime to those involved in accidents caused by uninsured AVs. This would provide a suitable measure of protection for such victims.

Any compensation regime should encompass both physical injuries and damage to third-party vehicles and property.

Consultation Question 54 (Paragraph 16.47)

18.56 We provisionally propose that:

- (1) product liability law should be reviewed to take account of the challenges of emerging technologies;**

(2) any review should cover product liability as a whole, rather than be confined to automated vehicles; it should not, therefore, form part of this project on automated vehicles. Do you agree?

We agree that product liability law should be reviewed to take into account emerging technologies (and in particular product liability in respect of faulty software). We note our concerns expressed in our Consultation Response dated 5 February 2019 regarding the application of the Consumer Protection Act 1987 to automated vehicles.

We also agree that the review should cover product liability as a whole, and that the correct approach is to deal with any such review outwith the context of this project on automated vehicles. Piecemeal reforms on specific categories of products may jeopardise the overall clarity and coherence of the existing body of law on product liability.

CHAPTER 17: ACCESS TO DATA

Consultation Question 55 (Paragraph 17.65)

18.57 We provisionally propose that:

- (1) for a vehicle to be classified as self-driving, it needs to record the location as well as the time at which the ADS is activated and deactivated;**
- (2) the Government should work within the UNECE to ensure data storage systems for automated driving record these data; and**
- (3) any national system to approve an ADS should require these data to be collected, subject to safeguards. Do you agree?**

Yes. In doing so it will be important to ensure transparency and to make sure that those using the vehicles know that they are being tracked etc. There would need to be clarity established through a DPIA or other means regarding the type, extent and purpose for which tracking data is processed as well as the purposes for which it might be used and with whom it might be shared.

Cybersecurity issues will not go away but it would seem essential to mandate certain standards to ensure that cars cannot be hacked easily. Any aggregated data used to update maps etc should be anonymised.

Consultation Question 56 (Paragraph 17.71)

18.58 We provisionally propose that legislation should impose a duty on those controlling AV data to disclose data to insurers, where the data is necessary to decide claims fairly and accurately. Do you agree?

Yes. However, this will require to be properly risk assessed in advance and a robust DPIA carried out to examine why and how the data will be used so that transparency is possible and disclosure does not go beyond what is necessary to satisfy the requirements of fair and accurate claims settlement.

Consultation Question 57 (Paragraph 17.81)

18.59 We provisionally propose that:

- (1) initially, DSSAD data from self-driving vehicles should be stored for three years; and**

(2) the issue should be reviewed in the light of experience. Do you agree?

The rules about the retention period of data collected from these activities and any subsequent processing should be explicitly publicised. It may also be helpful to specify the format of relevant files so that the issue of digital preservation is addressed at the outset and ensures that the data is accessible for the required retention period.

Consultation Question 58 (Paragraph 17.95)

18.60 We provisionally propose that:

- (1) when an ADSE applies for categorisation of its vehicle types as self-driving, it should present the regulator with details on how data will be recorded, stored, accessed and protected;**
- (2) the regulator should only categorise a system as self-driving if it is satisfied that that the ADSE has systems to abide by its obligations under the GDPR. Do you agree?**

Yes. Cybersecurity issues will continue to evolve but it would seem essential to mandate certain standards to ensure that cars cannot be hacked easily. Any aggregated data used to update maps etc should be anonymised.

We also note that self-driving vehicles may raise questions around international transfers of the data. It is important to ensure that rules around international transfers are effectively enforced to safeguard users' privacy rights. This topic of international data transfers may merit further consideration as it pertains to self-driving vehicles.

For further information, please contact:

Carolyn Thurston Smith
Policy Team
Law Society of Scotland

DD: [REDACTED]

[REDACTED]